IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 29, 2008 Session

STATE OF TENNESSEE v. STEPHEN MARK ADDLEBURG

Direct Appeal from the Criminal Court for Sullivan County
No. S52689 R. Jerry Beck, Judge

No. E2007-01548-CCA-R3-CD - Filed February 5, 2009

Defendant entered a plea of guilty as a Range II multiple offender to violation of driving while a habitual traffic offender (HTO) and violation of the light law. Pursuant to the negotiated plea agreement, Defendant was sentenced to two years for his HTO violation conviction, and he received a ten-dollar fine for violation of the light law. Following a sentencing hearing, the trial court denied Defendant's request for alternative sentencing and ordered Defendant to serve his sentence in confinement. On appeal, Defendant contends the trial court erred in its denial of alternative sentencing. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ALAN E. GLENN, J., joined.

P. Richard Talley, Dandridge, Tennessee, for the appellant, Stephen Mark Addleburg.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Mike Flynn, District Attorney General; and Julie Canter, Assistant District Attorney General, for the Appellee, the State of Tennessee.

OPINION

I. Background

Defendant testified at the sentencing hearing that he had a criminal record of over twenty years. According to the presentence report which was entered as an exhibit at the sentencing hearing without objection, Defendant has eight DUI convictions, four public intoxication convictions, six drug possession convictions, two driving while impaired convictions, three driving with a suspended or revoked license convictions, one HTO violation conviction, and one assault conviction.

Defendant testified that when he committed the offense, he was "behind the wheel" driving in order to teach someone how to operate his vehicle. He stated that other than this incident, he has not driven at all. Defendant also stated that he was involved in litigation with his brother over his late mother's estate. On cross-examination, Defendant admitted to a lengthy history of alcohol and drug abuse and stated that he still occasionally used alcohol. Defendant also admitted to having been previously placed on probation and having violated that probation.

Based on the evidence presented at the sentencing hearing, the trial court denied Defendant's request for probation or any other form of alternative sentencing.

II. Analysis

This Court's review of the sentence imposed by the trial court is *de novo* with a presumption of correctness. T.C.A. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999). If the trial court fails to comply with the statutory directives, there is no presumption of correctness and our review is *de novo*. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

The burden is upon the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d) (2006) Sentencing Commission Comments. In conducting our review, we are required, pursuant to T.C.A. § 40-35-210, to consider the following factors in sentencing:

> (1) [t]he evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.

Effective June 7, 2005, our legislature amended Tennessee Code Annotated section 40-35-102(6) by deleting the statutory presumption that a defendant who is convicted of a Class C, D, or E felony, as a mitigated or standard offender, is a favorable candidate for alternative sentencing. Our sentencing law now provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(5), (6) (emphasis added). Additionally, a trial court is "not bound" by the advisory sentencing guidelines; rather it "shall consider" them. Id. § 40-35-102(6).

"No longer is any defendant entitled to a presumption that he or she is a favorable candidate for probation." State v. Carter, 254 S.W.3d 335, 347 (Tenn. 2008). Generally, defendants classified as Range II or Range III offenders are not to be considered as favorable candidates for alternative sentencing. T.C.A. § 40-35-102(6). If a defendant seeks probation, then he or she bears the burden of "establishing suitability." Id. § 40-35-303(b). As the Sentencing Commission points out, "even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." Id. § 40-35-303, Sentencing Comm'n Cmts.

The following considerations provide guidance regarding what constitutes "evidence to the contrary":

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1); see also Carter, 254 S.W.3d at 347. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. T.C.A. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence.

As a Range II, multiple offender, Defendant is not considered a favorable candidate for alternative sentencing. See T.C.A. § 40-35-102(6). Nonetheless, he remains eligible for an alternative sentence because his sentences were ten years or less and the offenses for which he was convicted are not specifically excluded by statute. T.C.A. §§ 40-35-102(6), -303(a).

In the instant case, the trial court stated that Defendant had been convicted of "about every driving offense . . . including numerous prior DUI[s]." The trial court determined that Defendant did not have a good work or social history and that he had a "terrible" criminal record. As positive factors, the trial court considered the fact that Defendant had graduated from high school and attended some college. The trial court concluded, though, that the "unfavorable factors" heavily outweighed the positive factors.

Given Defendant's lengthy criminal history and the fact that he has been previously placed on probation and violated that probation, we conclude that the trial court did not abuse its discretion in denying alternative sentencing. Accordingly, Defendant is not entitled to relief.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

THOMAS T. WOODALL, JUDGE